KOKO MALAYSIA SDN BHD

v.

KESATUAN PEKERJA-PEKERJA PERKILANGAN PERUSAHAAN MAKANAN & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING MOTION NO: R2-25-17-2000]
6 FEBRUARY 2001

ADMINISTRATIVE LAW: *Exercise of judicial function - Judicial review - Certiorari - Quashing award of Industrial Court - When can High Court intervene - Guiding principles - Whether Industrial Court acted in excess of its jurisdiction - Section 30(4) Industrial Relations Act 1967 - Whether Industrial Court erred in law in arriving at decision*

LABOUR LAW: *Industrial Court - Award - Order of increased salary and benefits - Whether justified considering company's financial incapacity - Consideration of irrelevant factors in granting increase - Whether Industrial Court erred in law in arriving at decision*

This was the applicant company's application for judicial review to quash Industrial Court's ("the court") Award No. 713/1999 contending that its decision in ordering the applicant company herein to increase the shift allowance, medical benefits and to provide a pay rise of 7% across the board for all employees despite noting the company's financial incapacity to pay, was perverse and arbitrary.

Held:

[1] As this was an application for judicial review, it must be established where the error of law was, to show that the court had exceeded its jurisdiction for which an order of certiorari may be issued. An inferior tribunal has no jurisdiction to commit an error of law. The award was not sheltered by the privative clause under s. 33B (1) of the Industrial Relations Act 1967 ("the Act"). (p 537 c-e)

[2] There are two categories of cases where the High Court can intervene, ie where: (i) the High Court gives an objective assessment of the reasonableness of the court's decision based on the facts as found by the court; and (ii) the court failed to have regard to the issues raised by the parties or took into account some irrelevant consideration arriving at its conclusion apart from any specific findings of fact based on the credibility of witnesses. (p 537 f-g)

[3] The court in awarding the increase in the shift allowance without even considering the issue of financial capacity and without referring to s. 30(4) of the Act, had acted in excess of its jurisdiction. (p 538 f)

[4] The court not only failed to take into consideration the additional financial burden it was imposing on the applicant company, having agreed with the applicant's contention of financial difficulties, but took into consideration irrelevant factors in granting the increase. (p 539 b)

[4a] For instance, the court stated that increases in the consumer price index and the hardship the workers had gone through justified an upward revision of the shift allowance. In doing so, the court ignored a fundamental principle in wage fixation that the quantum of shift allowance cannot be linked to the increase in the consumer price index. (p 539 b-c)

[5] It was also not the function of the court to find fault with the management of the company. Furthermore, there were no facts or evidence before the court to conclude that the company was not properly managed. The fact nevertheless remained that the learned chairman had correctly recognised that the company's financial position was bad. (p 542 b-d)

[Application allowed. Order of certiorari issued.]

Case(s) referred to:

Airspace Management Services Bhd v. Col (B) Harbans Singh Chingar Singh [2000] 4 CLJ 77 ***(foll)***

Anisminic v. Foreign Compensation Commission [1969] 2 AC 147 ***(foll)***

Koko Malaysia Sdn Bhd v. Kesatuan Pekerja-pekerja Perkilangan Perusahaan Makanan & Anor [1999] 3 ILR 568 ***(refd)***

Lam Soon (M) Bhd v. Kesatuan Pekerja-pekerja Perkilangan Perusahaan Makanan [1999] 3 MLJ 347 ***(refd)***

Malayan Banking Bhd v. Association of Bank Officers, Peninsular Malaysia & Anor [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183 ***(refd)***

Malayan Commercial Banks Association v. National Union Of Bank Employees [1982] 1 ILR 246 ***(refd)***

Mersing Omnibus Co Sdn Bhd v. Kesatuan Pekerja-pekerja Pengangkutan Semenanjung Malaysia & Anor [1998] 2 CLJ (Supp) 354 ***(refd)***

Prestige Ceramics Sdn Bhd v. Kesatuan Pekerja-pekerja Barangan Bukan Logam v. Mahkamah Perusahaan Malaysia [2001] 5 CLJ 354 ***(refd)***

Sarawak Commercial Bank Asociation v. Sarawak Bank Employees Union [1990] 2 MLJ 315 ***(refd)***

Sistem Penerbangan Malaysia Bhd v. Kesatuan Kakitangan Eksekutif Sistem Penerbangan Malaysia [1996] 1 ILR 704 ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 ***(foll)***

Legislation referred to:
Industrial Relations Act 1967, ss. 30(4), 33B(1)

For the applicant - M Jothiletchimy; M/s Ramadass & Assoc
For the respondent - S Muhendaran; M/s Murugavell Arumugam & Co

Reported by Raja Vishnu Sivarajah

JUDGMENT

Faiza Tamby Chik J:
This is an application to quash the *Koko Malaysia Sdn Bhd v. Kesatuan Pekerja-pekerja Perkilangan Perusahaan Makanan & Anor* [1999] 3 ILR 568, shown at exh. MAT 3, pp. 129-143, encl. 1 As this is an application for judicial review and not an appeal, it must be established where an error of law is, to show that the Industrial Court has exceeded its jurisdiction for which an order of *certiorari* may be issued. Authorities have shown, that an inferior tribunal has no jurisdiction to commit an error of law - *Anisminic v. Foreign Compensation Commission* [1969] 2 AC 147. If such an error is made an order of *certiorari* may be issued - *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748. Hence the award is not sheltered by the privative clause under s. 33B(1) of the Industrial Relations Act 1967. In a recent decision of the Court of Appeal in *Airspace Management Services Bhd v. Col (B) Harbans Singh Chingar Singh* [2000] 4 CLJ 77 the court held that there are two categories of cases where the High Court can intervene:

(i) where the High Court gives an objective assessment of the reasonableness of the Industrial Court's decision based on the facts as found by the Industrial Court;

(ii) where the Industrial Court failed to have regard to the issues raised by the parties or took into account some irrelevant consideration arriving at its conclusion apart from any specific findings of fact based on the credibility of witnesses.

The grounds for the application are:

Ground 1
The Industrial Court acted without jurisdiction and or erred in law in that it failed to have regard to the mandatory statutory requirements in s. 30(4) of the Industrial Relations Act 1967, thereby failing to take into account a relevant consideration in making its award, when it ordered the applicant to increase the shift allowance and medical benefits and awarded a salary adjustment of 7% to all its employees despite noting the company's financial incapacity to pay the increases and salary adjustments (hereinafter referred to as the said benefits) thus arriving at a decision which was perverse and arbitrary.

It must be observed that the applicant company had right from the onset raised the plea of financial incapacity to meet the demands of the first respondent union to increase the existing salaries and benefits being given to its employees. In the applicant's statement in reply, exh. MAT2 of encl. 1 (pp. 53-57 thereof), in paras. 3, 5, 11 and 13 of the said statement in reply explained the applicant's financial inability and the financial difficulties it was facing at the material time which among others included the rising costs of cocoa beans which were imported from overseas. This had a significant effect on the applicant company being in the business of trading and processing of cocoa beans. The applicant company's financial losses from 31 March 1994 until 31 March 1998 is evidenced in CO1, CO2, CO3, CO4 and CO5, shown at pp. 58-117, encl. 1. This was not disputed. The court in fact took note of the financial incapacity to pay the increased wages and benefits but failed to appreciate the same when it awarded increases in favour of the union's demand. The Industrial Court in making its decision, did the following. In respect of the shift allowance, the court increased the same without addressing it's mind to the applicants pleas and submission on the financial difficulty it faced. Pages 132 and 133 of encl. 1, would show the relevant pages of the said award where the Industrial Court failed to consider the issue of financial incapacity and failed to also consider s. 30(4) of the Industrial Relations Act 1967, before awarding the increased shift allowance. The court merely stated that:

> Due to the increase in CPI and also the hardship that the workers had gone through we would like to propose the following ... .

The Industrial Court in awarding the said increase in the shift allowance without even considering the issue of financial incapacity and without referring to s. 30(4) of the said Act, is in my opinion have acted in excess of its jurisdiction. Section 30(4) of the said Act provides as follows:

> In making its award in respect of a trade dispute, the Court shall have regard to the public interest the financial implications and the effect of the award on the economy of the country and on the industry concerned and also to the probable effect in related or similar industries.

The High Court in *Mersing Omnibus Co Sdn Bhd v. Kesatuan Pekerja-pekerja Pengangkutan Semenanjung Malaysia & Anor* [1998] 2 CLJ (Supp) 354 held that s. 30(4) of the said Act is a mandatory provision and that therefore strict compliance of its provision is called for and that failure to adhere to the said provision renders the impugned award erroneous in law. The decision in *Mersing Omnibus* case applied in *Lam Soon (M) Bhd v. Kesatuan Pekerja - pekerja Perkilangan Perusahaan Makanan* [1999] 3 MLJ 347. In this case, when the Industrial Court ordered the shift allowance to be increased from RM2 to RM3 for the second shift and from RM3 to RM4 for the third shift the rationale given by the court for the increase was as follows:

> Due to the increase in C.P.1. and also the hardship that the workers had gone through, we would like to propose the following:
>
> 1st shift = Nil 2nd shift = RM3 3rd shift = RM4

The Industrial Court not only failed to take into consideration the additional financial burden it was imposing on the applicant company, having agreed with the applicant's contention of financial difficulties (as set out at p. 12 of the award) but it also took into consideration irrelevant factors in granting an increase. The Industrial Court appears to state that increases in the CPI (consumer price index) and the hardship the workers had gone through justifies an upward revision of the shift allowance. In doing so, the Industrial Court ignored a fundamental principle in wage fixation that the quantum of shift allowance cannot be linked to the increase in the consumer price index. Shift allowance is paid primarily for the additional inconvenience caused through working irregular hours. To justify an increase, the union would have to show that the hardship experienced by the working in shift has increased from the time of the previous collective agreement. As the union had not produced any justifiable reason for seeking an increase and since there is no direct nexus between shift allowance and increase in consumer price index, the Industrial Court committed an error of law in arriving at the said decision. In *Malayan Commercial Banks Association v. National Union Of Bank Employees* [1982] 1 ILR 246 the Industrial Court rationalised the use of the C.P.I. in determining salary adjustments in collective agreements as follows:

> In the private sector, salaries are reviewed once every three years. Where the increases sought are on grounds of an increase in the cost of living, the review should be based on the increase that has actually taken place since the last review in order to determine what salaries should be paid during the next three years. In determining the new salaries, however, no account should be taken of possible increases that might occur during the next three year period. There are two reasons why we should not take into account future possibilities. Firstly, it is difficult to predict the future. If the practice is allowed, it may well be argued that the economic forecast is a downward trend, recession, even depression in which event, salaries should be reduced not increased. Secondly, if current salaries already include an element of inflation in future, the salary levels of the past should be discounted to the extent of the forecast.
>
> We are of the view that salary increases based on the C.P.I. should be an exercise of looking back to see whether salaries determined three years ago have been in any affected by the C.P.I. of today. The general practice is not to match the full extent of the increase in the C.P.I. In some countries, the amount of increase allowed is 60%. In this country, we think, the general rule should be that salary increases based purely on the increase in the C.P.I. should not be less than 60% or more than 2/3 of the average increase of the C.P.I. over the previous three year period. (pp. 13 and 24 of RBOA).

The High Court in *Sarawak Commercial Bank Asociation v. Sarawak Bank Employees Union* [1990] 2 MLJ 315 held:

> the Act does not specify the formula for the computation on the rates of pay and the legislature thought it best to leave it to the Industrial Court to find the basis for such computation as can be seen from 30(4) and (5) of the Act.

The second respondent was provided with a CPI increase of 13.85% over the preceding three years of the agreement. The guideline of 2/3rd and 60% of this figure would be 9.2% and 8.3%. The second respondent awarded 7%. How then it is contended be argued that the second respondent had ignored the financial implications on the applicant? Firstly it must be observed that the financial losses of the company as shown by its exhs. (CO1 - CO5, pp. 58-117, encl. 1) were not disputed. The figures shown were not disputed. It is observed that the respondent has, however disputed throughout the hearing before the second respondent, that the accounts do not reveal insolvency or any financial incapacity. While the court is usually guided by the Industrial Court in *Malayan Commercial Banks Association v. National Union Of Bank Employees* [1982] 1 ILR 246 in granting wage revisions, the most important factor in determining wage adjustments and increases is the issue of the financial capacity of the employer to grant the increases sought. Thus, while the Industrial Court on this case awarded a 71% salary adjustment which is lower than the two-third of the increase in CPI for the relevant period, it is I think that considering the financial incapacity of the applicant company, the Industrial Court should not have granted any increase at all. The Industrial Court in Award, *Sistem Penerbangan Malaysia Bhd v. Kesatuan Kakitangan Eksekutif Sistem Penerbangan Malaysia* [1996] 1 ILR 704, held that the general principle relied on in industrial law in respect of salary increases can be departed from as it is a "general rule only". The Industrial Court in that case held that what should be granted must be fair and equitable taking into account not only the awards of the Industrial Court but also the size and standing of the company. In this case, the financial standing of the applicant is not good and therefore the Industrial Court should have given consideration to the same in making its decision.

Ground 2

The Industrial Court acted without jurisdiction and or erred in law when it considered the said benefits in favour of the respondent union after having held at p. 12 of the award that .. "We are fully aware of the company's plea of financial incapacity to pay but the company's financial position though not very sound was not as bad as was painted out to be", thereby failing to take into consideration relevant matters of greater importance and taking into considerations matters not adduced as evidence such as whether the company had been properly managed."

The company had pleaded, in the statement in reply, (exh. 'MAT2') that its financial position was bad and that it was suffering losses since 1994 and that the total accumulated loss of the company was RM10 million as at 31st March 1998. The company had also pleaded to the Industrial Court to have regard to s. 30(4) of the Industrial Relations Act 1967 which states as follows:

> In making its Award in respect of a trade dispute, the Court shall have regard to the public interest, the financial implications and the effect of the Award on the economy of the country and on the industry concerned.

Following submissions made, the Industrial Court came to the conclusion that "we are fully aware of the company's plea of financial incapacity to pay ..." but went on to reach the conclusion that, "the company's financial position though not very sound, was not as bad as was painted out to be ..." It is submitted that the Industrial Court had no rational basis for coming to such a conclusion. At p. 10 of the award, ('MAT3') the learned chairman had observed that, "Thus far there has been no belt-tightening measures taken to control the situation. There was no restructuring or organisation despite claiming an accumulated loss of more than RM16 million since 1991." I am of the opinion that the Industrial Court had no rational basis for coming to such a conclusion as it had noted at para. 17 p. 11 of the award that the applicant company had taken various measures to curb the downward slide by:

(a) Closing its factory in Parit Buntar in 1995;

(b) Stopping increment for executives some 4 years;

(c) No dividend was declared;

(d) Moved the administration office from Kuala Lumpur to Hutang Melintang and

(e) No bonus was declared.

Therefore, when the chairman came to the conclusion at p. 13 of the award that:

> Furthermore the Company's poor financial performance was not entirely due to the economic downturn but rather the market forces of supply and demand of Cocoa Beans in the world market. Speculation buying of Cocoa Beans at high prices in forward contracts and forced selling of finished products at lower price due to commodity fluctuation, cash/low problem and demand of bank interest, have jointly contributed to the accumulated losses incurred. The Company could have been in a better financial standing had it been properly managed.

The fact remains that the learned chairman had correctly recognised the fact that the company's financial position was bad. The function of the learned chairman was to determine, based on the facts and evidence available before him, whether the applicant company was in a financial position to meet the additional financial burden which the union was seeking to impose on the applicant company. It was not the function of the Industrial Court to find fault with the management of the company. Therefore by stating that, "the company could have been in a better financial standing had it been properly managed", the learned chairman had reached absurd results or reached results absurdly in that the decision arrived at lacked a rationally probative basis in fact. The learned chairman's decision is therefore irrational and devoid of plausible justification (see *Malayan Banking Bhd v. Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183). There were no facts or evidence before the Industrial Court to conclude that the applicant company was not properly managed.

Ground 3

The Industrial Court in making its award, acted without jurisdiction and or erred in law when in spite of having made the findings at p. 13 of the award that the applicant suffered a "poor financial performance" it nevertheless ordered the applicant to provide a pay rise of 7% across the board for all employees of the applicant company thereby disregarding the financial implication and effects of the decision on the industry of the applicant company.

It can be seen that despite the submission, arguments and facts produced by the applicant company and the fact that the Industrial Court took cognisance of the fact that the company's financial position was poor, the learned chairman nevertheless went on to award 7% salary adjustment to all the employees covered by the collective agreement. I think this decision is perverse and devoid of any merit. The applicant company had pleaded, at para. 3 to 6 of the statement in reply the poor financial situation of the applicant company especially the difficulty the industry was facing. The learned chairman appears not to have taken into consideration the additional financial obligations it was imposing on the applicant company.

As I commented in *Prestige Ceramics Sdn Bhd v. Kesatuan Pekerja-pekerja Barangan Bukan Logam v. Mahkamah Perusahaan Malaysia* [2001] 5 CLJ 354 that:

> It must be emphasised, that this was not a case of an employer who was seeking a wage cut for its workers or a withdrawal of their benefits. All the Applicant sought was a halt in the increase in its outlay for Unionised employees through the payment of annual increments and bonuses as it had instituted for all other levels of staff in uniform. However, notwithstanding this

> the Industrial Court did not appear to have considered whether a decision to compel the Applicant to carry this additional burden was a course of action which can in good conscience be taken in the light of the facts and circumstances of this case. The obvious question that the Industrial Court ought to have addressed was whether it was conscionable for the applicant to have to pay one set of workers annual increments and bonuses whilst all other workers and even the shareholders had received a reduction in their entitlements. The Industrial Court disregarded this and instead made its Award summarily based on a mindset that it may not have regard to financial difficulties.

Thus, when the Industrial Court came to a finding that "the company can still afford a small pay rise and taking into consideration of the CPI of 13.85% for the relevant period I would recommend a pay rise of 7% across the board for all employees." I come to the conclusion that the learned Chairman committed an error of law by failing to have sufficient regard to s. 30(4) of the Industrial Relations Act 1957. The award is flawed and therefore an order of *certiorari* is hereby issued. In the *Mersing Omnibus* case, as cited above, the learned judge held that:

> There is no degree of nullity and if there is an error of law on which the award of the Industrial Court is founded, such error must necessarily be without jurisdiction or in excess of jurisdiction (see *Enesty Sdn Bhd v. Transport Workers Union & Anor* [1986] 1 MLJ 18).

This application is allowed with cost.